

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JIMMY TODD KIRKSEY,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

2:97-CV-0333-GMN-PAL

**ORDER**

On May 10, 2010, this court granted petitioner Kirksey's unopposed motion to vacate the stay and reopen proceedings in this habeas case brought under 28 U.S.C. § 2254.<sup>1</sup> Docket #173. On July 19, 2010, Kirksey filed his fourth amended petition for writ of habeas corpus. Docket #177. Having been directed by the court to respond to the petition, the respondents filed, on September 30, 2010, a motion entitled "Motion to Dismiss Petition for Writ of Habeas Corpus, or Alternatively to Hold Proceedings in Abeyance Pending Resentencing of Petitioner." Docket #182. On November 10, 2010, Kirksey filed an opposition to that motion and his own motion for an evidentiary hearing. Docket ## 186/187. With this order, the court decides both motions.

*1. Motion to dismiss or hold in abeyance*

In asking the court to either dismiss this action or hold it in abeyance, respondents argue that,

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<sup>1</sup> The case had been stayed, pursuant to a stipulation, since May 6, 2003, to allow Kirksey to litigate claims in state court. Docket #145.

1 because Kirksey's death sentence has been set aside by the state court pursuant to *Atkins v. Virginia*,  
2 536 U.S. 304 (2002), any further habeas proceedings in this court must await resentencing.  
3 Respondents cite no legal authority in support of their motion, but this court is abundantly aware of  
4 "the general rule that a petitioner must await the outcome of the state proceedings before  
5 commencing his federal habeas corpus action." *Edelbacher v. Calderon*, 160 F.3d 582, 583 (9<sup>th</sup> Cir.  
6 1998). Nonetheless, Kirksey makes a convincing argument that the holding in *Phillips v. Vasquez*,  
7 56 F.3d 1030 (9<sup>th</sup> Cir. 1995), not *Edelbacher*, controls this case.

8 In *Phillips*, the court of appeals held that a capital habeas petitioner could pursue federal  
9 habeas relief on exhausted claims challenging his conviction even though proceedings regarding his  
10 sentence had yet to be concluded in state court. 56 F.3d at 1037-38. Among the overriding factors  
11 in *Phillips* were that (1) the guilt phase of the petitioner's case was undisputedly final in state court  
12 and federal proceedings on his guilt phase claims would not impact state court proceedings and (2)  
13 with a fifteen year delay and no end in sight in reaching finality as to the petitioner's sentence, his  
14 "right to reasonably prompt constitutional scrutiny of his conviction outweigh[ed] any prudential  
15 concerns that might exist." *Id.* at 1033-36.

16 Here, like the petitioner in *Phillips* and in *Edelbacher*, Kirksey has exhausted his remedies in  
17 state court with respect to the issue of guilt. In one respect, this case is more like *Edelbacher* than  
18 *Phillips* in that Kirksey has yet to be resentenced in the state trial court. That fact mattered to the  
19 court in *Edelbacher*, however, only because the court was unable to classify the case as either  
20 "capital" or "non-capital." 160 F.3d at 585. Here, the state court's determination that Kirksey is  
21 mentally retarded for the purposes of *Atkins* and Nev. Rev. Stat. 175.554(5)<sup>2</sup> means that Kirksey will

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23 <sup>2</sup> Nev. Rev. Stat. 175.554(5) was promulgated pursuant to *Atkins* and provides as follows:

24 If a sentence of death is imposed and a prior determination regarding mental  
25 retardation has not been made pursuant to NRS 174.098, the defendant may file a motion  
26 to set aside the penalty on the grounds that the defendant is mentally retarded. If such  
a motion is filed, the court shall conduct a hearing on that issue in the manner set forth  
in NRS 174.098. If the court determines pursuant to such a hearing that the defendant  
is mentally retarded, it shall set aside the sentence of death and order a new penalty  
hearing to be conducted. Either party may appeal such a determination to the Supreme

1 not be sentenced to death in a future penalty proceeding. Thus, for all relevant purposes, this is now  
2 a “non-capital” case.

3 Otherwise, the “unusual circumstances” of this case are akin *Phillips* in the sense that any  
4 concern that this court’s adjudication of Kirksey’s pending federal petition will infringe on state  
5 court proceedings is outweighed by the need to vindicate his right to prompt federal habeas review.  
6 *See Younger v. Harris*, 401 U.S. 37, 43-45 (1971) (explaining that the federal judiciary, “anxious  
7 though it may be to vindicate and protect federal rights and federal interests,” must “do so in ways  
8 that will not unduly interfere with the legitimate activities of the States”). Kirksey was convicted 21  
9 years ago. All of the claims in his current federal petition challenge only his conviction, not his  
10 sentence. The respondents, in their motion, mention “on-going” state court proceedings, but provide  
11 no information as to the status of those proceedings (e.g., whether or when a new penalty hearing is  
12 scheduled to take place). Moreover, with the death penalty no longer an option, the outcome of that  
13 proceeding is not likely to result in unwieldy piecemeal litigation.<sup>3</sup> *See Phillips*, 56 F.3d at 1036.

14 In addition, despite having the opportunity to oppose Kirksey’s motion to vacate the stay, the  
15 respondents stood silent. Instead, they waited several months after proceedings had resumed in this  
16 court before filing their motion to dismiss or hold in abeyance. Respondents have also not bothered  
17 to reply to Kirksey’s opposition to their current motion, in which Kirksey makes his arguments under  
18 *Phillips*.

19 Based on the foregoing, respondents’ “Motion to Dismiss Petition for Writ of Habeas  
20 Corpus, or Alternatively to Hold Proceedings in Abeyance Pending Resentencing of Petitioner”  
21 (docket #182) shall be denied.

22 *2. Motion for evidentiary hearing*

23 The scheduling order governing this case, while somewhat ambiguous, contemplates that the  
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25 Court pursuant to NRS 177.015.

26 <sup>3</sup> Under Nevada law, the only possible sentences for Kirksey at this point are life with the possibility of parole or life without the possibility of parole. Nev. Rev. Stat. 175.552(4).


1 petitioner may request an evidentiary hearing on issues raised in a motion to dismiss, as well as in  
2 support of the substantive merit of his habeas claims. Docket #181, p. 2. With his motion, Kirksey  
3 seeks a hearing falling into the latter category. Because respondents have yet to file an answer, the  
4 motion is premature. *See* Rule 8(a), Rules Governing Habeas Corpus Cases Under Section 2254  
5 (providing that the court must review the answer and other specified materials to determine whether  
6 an evidentiary hearing is warranted). Thus, the motion shall be denied without prejudice.

7 **IT IS THEREFORE ORDERED** that respondents' "Motion to Dismiss Petition for Writ of  
8 Habeas Corpus, or Alternatively to Hold Proceedings in Abeyance Pending Resentencing of  
9 Petitioner" (docket #182) is DENIED. Respondents shall have 60 (sixty) days from the date this  
10 order is entered within which to file and serve an answer to petitioner's amended petition for writ of  
11 habeas corpus (docket #177).

12 **IT IS FURTHER ORDERED** that petitioner's motion for evidentiary hearing (docket #187)  
13 is DENIED without prejudice to petitioner bringing such motion concurrently with, but separate  
14 from, his reply to respondents' answer.

15 **IT IS FURTHER ORDERED** that, in all other respects, the scheduling of this matter is  
16 governed by the scheduling order entered on July 20, 2010 (docket #181).

17 DATED this 23rd day of December, 2010.

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Gloria M. Navarro  
United States District Judge  
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